Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Modification and Clarification of Policies and	)	
Procedures Governing Siting and Maintenance	)	RM-8763
of Amateur Radio Antennas and Support	)	
Structures, and Amendment of Section 97.15	)	
of the Commission's Rules Governing the	)	
Amateur Radio Service	)	

ORDER ON RECONSIDERATION

Adopted: November 13, 2000 **Released: November 15, 2000**

By the Deputy Chief, Wireless Telecommunications Bureau:

I. Introduction and Executive Summary

1. In this *Order on Reconsideration*, we address Petitions for Reconsideration (*ARRL Petition*) filed by the American Radio Relay League, Inc. (ARRL), and by Barry N. Gorodetzer and Kathy Conard-Gorodetzer (*Gorodetzer Petition*) (collectively "*Petitioners*"). The *Petitions* seek reconsideration of a Wireless Telecommunications Bureau (Bureau) *Order*,[1] released November 19, 1999, denying the petition for rule making filed by ARRL on February 7, 1996.[2] For the reasons given herein, we deny the subject petitions for reconsideration.

II. Background

2. In its 1985 *PRB-1* decision, the Commission established a policy of limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures.[3] However, the Commission expressly decided not to extend its limited preemption policy to covenants, conditions and restrictions (CC&Rs) in deeds and in condominium by-laws.[4]

3. On February 7, 1996, ARRL filed a petition for rule making seeking a review of the Commission's limited preemption policy. ARRL requested, *inter alia*, that limited preemption be extended to CC&Rs. In an *Order*, released November 19, 1999, we denied the petition for rule making. We concluded that specific rule provisions bringing private restrictive covenants within the ambit of

[1] Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, *Order*, RM-8763, DA 99-2569 (WTB rel. November 19, 1999) (*Order*).

[2] ARRL Petition for Rule Making (RM-8763), filed February 7, 1996.

[3] *See* Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, *Memorandum Opinion and Order*, PRB-1, 101 FCC 2d 952, 960 ¶ 24 (1985) (*PRB-1*).

[4] *Id.* at 954 ¶ 7, 960 n.6.

PRB-1 were not necessary or appropriate.[5] On reconsideration, the petitioners reiterate the request that the Commission's limited preemption policy be extended to CC&Rs.[6] ARRL also seeks a declaratory ruling that the imposition of unreasonable or excessive costs in obtaining a land use permit for an amateur antenna, or fulfilling a condition in such a permit, would be contrary to the Commission's limited preemption policy enunciated in *PRB-1*.[7]

III. Discussion

4. In *PRB-1*, the Commission stated that CC&Rs restricting amateur operations were not a matter of concern to it,[8] because "[s]uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed,"[9] and "[p]urchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere."[10] ARRL directed much of its rulemaking petition, and the bulk of its Petition for Reconsideration,[11] to arguing that the Commission has authority to preempt CC&Rs that restrict amateur operations. In the *Order*, we declined to address this argument because we were not persuaded that such action, even if authorized, is "necessary or appropriate at this time."[12]

5. The *Petitioners* contend, however, that the Telecommunications Act of 1996 provided the Commission with the authority to address CC&Rs,[13] and, further, that the Commission has acknowledged this authority.[14] ARRL further argues that restrictive covenants in deeds "have never been

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[5] *Order*, ¶ 6.

[6] *ARRL Petition* at i, 12; *Gorodetzer Petition* at 1. Both petitions were placed on public notice on February 11, 2000. *See Public Notice*, Report No. 2388 (rel. February 11, 2000); *see also* Petitions for Reconsideration of Action in Rulemaking Proceedings, *Public Notice*, 65 Fed. Reg. 7873 (February 16, 2000). Comments supporting the *ARRL Petition* were received from Duane T. Mantick, No Code International (NCI) and Craig S. Kidder (filed late). In addition, on February 18, 2000, we received a letter from Kerry Steffens which is tangentially related to this proceeding. Letter, received February 18, 2000, from Kerry Steffens to Federal Communications Commission. Mr. Steffens requests that the Commission's original limited preemption policy as enunciated in *PRB-1* be changed to indicate that restrictive covenants in private agreements are within the jurisdiction of the local zoning authority. Not only is such suggestion untimely filed, given that *PRB-1* was adopted on September 16, 1985, but it also is beyond the scope of the instant proceeding. Therefore, no action will be taken on Mr. Steffens's suggestion.

[7] *ARRL Petition* at 16.

[8] *PRB-1*, 101 FCC 2d at 954 ¶ 7.

[9] *Id.* at 960 n.6.

[10] *Id.* at 955 ¶ 9.

[11] *See ARRL Petition* at 4-12.

[12] *Order*, ¶ 6.

[13] *See* Pub. L. 104-104, 110 Stat. 56, § 207 (1996).

[14] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996, and Restrictions on Over-the-Air Reception Devices: Television Broadcast (continued....)

the equivalent of private contracts."[15] Moreover, ARRL states that the purchaser of land, in modern transactions, "never actually agrees, and very seldom even understands when he or she buys property subject to deed restrictions that amateur antennas are not permitted."[16]

6. Assuming, without deciding, that the Commission has authority to address CC&Rs in the context of amateur radio facilities, this alone does not necessarily warrant revisiting the exclusion of CC&Rs from the Commission's limited preemption policy in this context. Unlike over-the-air reception devices (OTARDs), which are very limited in size in residential areas,[17] amateur station antennas may vary widely in size and shape. Amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length. They can be constructed of various materials occupying completely an area the size of a typical backyard.[18] In addition, there can be an array of different types of antennas. Regardless of the extent of our discretion with respect to CC&Rs generally, we are not persuaded by ARRL's arguments that it is appropriate at this time to consider exercising such discretion with respect to amateur station antenna preemption.[19] Moreover, we do not believe that ARRL has demonstrated that there has been a significant change in the underlying rationale of the PRB-1 decision, or that the facts and circumstances in support thereof, that would necessitate revisiting the issue. In the absence of such showing, we believe that the PRB-1 ruling correctly reflects the Commission's preemption policy in the amateur radio context.

7. In *PRB-1*, the Commission held that "local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."[20] The ARRL's second request in its *Petition* concerns imposition of

(Continued from previous page)

Service and Multichannel Multipoint Distribution Service, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59 and CS Docket No. 96-83, 11 FCC Rcd 19276, 19302 ¶ 42 (1996) (*OTARD R&O*).

[15] *ARRL Petition* at 11 n.9.

[16] *Id. See also Gorodetzer Petition* at 1 ("In many areas it is extremely difficult to find affordable housing in acceptable neighborhoods without mandatory membership in a Home Owners Association. . . . The argument about voluntarily entering into private agreements is moot because, much more frequently than not, there is no real choice for the home buyer.").

[17] *OTARD R&O*, 11 FCC Rcd at 19293-95 ¶¶ 28-31.

[18] *See, e.g.*, David Blaschke, W5UN, *The Mighty Big Antenna*, QST, Sept. 2000, at 28-29; *see also* Bill Wageman, K5MAT, *Grid Chasing: Fixed or Mobile?*, QST, Sept. 2000, at 30-31.

[19] *Cf.* Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 at paras. 94-124 (rel. 10/25/00) (extending Commission's OTARD rules to fixed wireless communications devices that are similar to those used to receive multichannel video programming).

[20] *PRB-1*, 101 FCC 2d 960 ¶ 25.

excessive costs for, or the inclusion of burdensome conditions in, permits or variances needed prior to installation of an outdoor antenna. As it did in its petition for rule making, ARRL requests a ruling from the Commission that imposition of unreasonable or excessive costs levied by a municipality for a land use permit, or unreasonable costs to fulfill conditions appended to such permit, violates *PRB-1*.[21] In our *Order*, we concluded that the current standards in *PRB-1* of reasonable accommodation and minimum practicable regulation are sufficiently specific to cover any concerns related to unreasonable fees or onerous conditions.[22] With these guidelines in place, an amateur operator may apprise a zoning authority that a permit fee is too high, and therefore unreasonable, or that a condition is more than minimum regulation, and, therefore, impracticable to comply with.

8. We take this opportunity to amplify upon the meaning of 'reasonable accommodation' of amateur communications in the context of local land use and zoning regulations. The Commission adopted a limited preemption policy for amateur communications because there is a strong federal interest in promoting amateur communications. We do not believe that a zoning regulation that provides extreme or excessive prohibition of amateur communications could be deemed to be a reasonable accommodation. For example, we believe that a regulation that would restrict amateur communications using small dish antennas, antennas that do not present any safety or health hazard, or antennas that are similar to those normally permitted for viewing television, either locally or by satellite, is not a reasonable accommodation or the minimum practicable regulation. On the other hand, we recognize that a local community that wants to preserve residential areas as livable neighborhoods may adopt zoning regulations that forbid the construction and installation in a residential neighborhood of the type of antenna that is commonly and universally associated with those that one finds in a factory area or an industrialized complex. Although such a regulation could constrain amateur communications, we do not view it as failing to provide reasonable accommodation to amateur communications.

9. In his comments supporting the *ARRL Petition*, Duane Mantick states that the Commission's rules regarding radio frequency (RF) safety and the actions of local authorities are inconsistent because to comply with the RF safety requirements[23] an antenna must be a certain height in order to keep 2 meter and 10 meter radio signals away from the general public.[24] According to Mr. Mantick, this is in direct conflict with the local zoning regulations and covenant provisions which are designed to keep the height of the antenna structure as low as possible.[25] Mr. Mantick argues that the amateur operator must, in order to comply with safety requirements, reduce output power to 50 watts or less and thus sacrifice transmission effectiveness, and due to a low antenna, sacrifice reception effectiveness as well.[26] It appears

[21] *ARRL Petition* at 16.

[22] *Order*, ¶ 9.

[23] *See* 47 C.F.R. § 97.13(c); *see also* FCC's OET Bulletin 65 entitled *Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radio Frequency Electromagnetic Fields* (OET Bulletin 65).

[24] Duane T. Mantick Comments at 4-5.

[25] *Id.*

[26] *Id.* at 5.

that Mr. Mantick's comments overstate the situation that an amateur operator faces. An environmental evaluation needs to be made only if the power on 10 meters exceeds 50 watts.[27] Further, if more power is employed at the station and measures are required to prevent human exposure to RF electromagnetic fields, then adjustments can be made at the amateur station regarding the amount of power used, the duty cycle employed, and the antenna configuration.[28] Thus, it is feasible for an amateur operator to comply with the Commission's safety requirements relating to human exposure to RF radiation, and at the same time to comply with local zoning regulations that govern antenna height. In sum, while we appreciate that the two considerations discussed above, that is, safety requirements *vis-à-vis* zoning regulations, might present a challenge to the amateur operator, we do not believe that the safety of individuals should be compromised to address such challenge. Moreover, we continue to believe that we should not specify precise height limitations below which a community may not regulate, given the varying circumstances that may occur, as a response to this challenge.[29]

IV. Conclusion

10. Accordingly, we conclude that the Petitions for Reconsideration filed by the ARRL and Barry and Kathy Conard-Gorodetzer should be partially granted insofar as we have provided clarification herein, but in all other respects should be denied.

V. Ordering Clause

11. IT IS ORDERED THAT, pursuant to Sections (4)(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405(a), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petitions for Reconsideration of the American Radio Relay League, Inc., filed on December 20, 1999, and Barry and Kathy Conard-Gorodetzer, filed on December 17, 1999, ARE PARTIALLY GRANTED to the extent clarification has been provided herein, but in all other respects ARE DENIED. This action is taken under delegated authority contained in Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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[27] 47 C.F.R. § 97.13(c)(1).

[28] *See* OET Bulletin 65, Supplement B at 5.

[29] *PRB-1*, 101 FCC 2d at 960 ¶ 25; *Order*, ¶ 8.